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No. 80-709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MINWER A. BADWAN
AND
RAWHI A. BADWAN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION and VIRGINIA AFFILIATE OF AMERICAN CIVIL LIBERTIES UNION

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QUESTION PRESENTED

What standards should guide the discretion of a trial judge in the grant or denial of a continuance in a criminal case where:

(a) The request is not made for delay; and

(b) No unreasonable delay is necessitated; and

(c) Where defense counsel has been reasonably diligent in attempting, unsuccessfully, to procure evidence for the defense; and

(d) Where a continuance is necessary to allow the defense to seek the aid of experts or other witnesses who are reasonably necessary to effectuate an adequate defense; and

(e) Where counsel's actual performance, while not so grossly defective as to violate the Sixth Amendment right to counsel, is nonetheless less than reasonably effective, and

(f) The case is complex, and its nature calls for complex expert advice, the character of which cannot be predicted fully in advance.

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INTEREST OF AMICI CURIAE VIRGINIA TRIAL LAWYERS ASSOCIATION AND VIRGINIA AFFILIATE OF AMERICAN CIVIL LIBERTIES UNION

The Virginia Trial Lawyers Association is an organization formed in 1960, now consisting of 2,282 members of the Virginia Bar. It is not a partisan organization, is not an affiliate of any other association, and its membership and governing bodies include prosecutors, defense counsel (civil and criminal) and plaintiffs' lawyers.

The Virginia Affiliate of the American Civil Liberties Union is an organization of lawyers and laymen sharing common interests and goals fostering civil rights and civil liberties in this country.

We are jointly concerned with the policy of some judges in the Eastern District of Virginia in pressing criminal defendants precipitously to trial before an opportunity for adequate investigation can be made. Continuances, however reasonable, are routinely denied. As trial lawyers, we are acutely aware of the need for adequate preparation to produce an effective defense. Even the diligent must have adequate time. Expeditiousness is one thing, but riding "roughshod over the right of defendants to prepare for trial" and present a defense is quite another. *Gavino* v. *United States,* 499 F2d 1191, 1196 (2d Cir. 1974).

As trial lawyers and civil libertarians we seek uniform guidelines from the Supreme Court that will strike a delicate balance, giving due consideration to the right to adequately prepare a defense against the public's right to a speedy and just determination. The issue cuts both ways. Prosecutors occasionally will need continuances to prepare strong cases against wrongdoers.

SUMMARY OF ARGUMENT

We do not lightly intervene in this action. As representatives of many experienced Virginia trial and appellate lawyers, we know that the grant of a continuance is within the sound discretion of the trial judge; only in rare circumstances will an appellate court find an abuse of that discretion. Protection of fundamental constitutional rights, however, is not a matter of discretion. Where a federal judicial district elevates expediency above the interest of the public in fair criminal proceedings, and *routinely* denies well-

founded requests for more pretrial preparation, then there is a compelling need for this Court to take remedial action.

The only *effective* way to assure fair trials is to provide the accused with the *effective* assistance of counsel.

Experience has taught that a defendant's constitutional rights are mere platitudes unless given meaning and life by the courts. Implicit in the concept of due process is the requirement that an accused be afforded opportunity to *effectively* explore his avenues of defense. Thus, the touchstone of analysis in cases where it is alleged that the accused has been denied a fair trial and the effective assistance of counsel because of a trial court's denial of a continuance request must be whether the accused was accorded the *meaningful* use of his constitutional trial rights.

Where defense counsel has represented the accused with due diligence and makes a reasonable request for additional preparation time in a complex criminal case involving voluminous government evidence, and where no prejudice to the public is claimed, then fundamental fairness requires that the request be granted, particularly when trial can still be conducted within 70 days of arraignment, the period provided for a "speedy trial" under the Speedy Trial Act.

This case, and the policy of the Eastern District of Virginia of unnecessarily rushing criminal defendants to trial, sufficiently threatens Constitutional values and the administration of justice to require the Court's exercise of its supervisory powers, in this case, and reversal on the merits.

INTRODUCTION

The facts of this case, and the general principles of law relating to continuances and preparation time necessary for the effective assistance of counsel, have been fully stated in the opinions below and the Petition for Certiorari. *Badwan*

v. *United States,* No. 80-709 (hereafter Petition) pp. 4-10, 15a-20a, 25a-30.

ARGUMENT

A Unified Federal Standard Is Needed To Govern Defense Requests For Additional Preparation Time To Assure The Effective Assistance Of Counsel And Fair Trials

A. Pretrial Preparation Is The Key To Effective Assistance Of Counsel

Preparation is the key to effective representation. The Sixth Amendment's guarantee of "assistance of counsel" is designed to assure the defendant "effective aid in the *preparation and* trial of the case." *Powell* v. *Alabama,* 287 U.S. 45, 71 (1932). This means that the defendant must be accorded a meaningful opportunity to counter the government's case.

Thorough preparation requires familiarity with both the facts and the law.

> Generally, an attorney can be effective in a trial only to the extent that he has the *information* necessary to *plan* effectively. . . . Where planning is foreclosed by lack of information, as has long been the custom in much of criminal litigation, surprise and gamesmanship usually govern the conduct of the proceedings.
>
> *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial,* Commentary Section 1.1(a)(iii) (Approved Draft 1970) (hereafter, ABA Standards)

Powell v. *Alabama* made clear that the Sixth Amendment guarantee of assistance of counsel demands an in-

[1] Italics added here and below.

quiry "whether the defendants were *in substance* denied the right of counsel." 287 U.S. at 52.

The Court noted:

> during perhaps the most critical period of the proceedings . . . that is from the time of their arraignment until the beginning of their trial, when consultation *and thorough-going investigation* and preparation were vitally important, the defendants did not have the aid of counsel in any real sense.

Id. at 57.

Whenever counsel has been required to work under circumstances that render his services ineffective, the Court has not hesitated to intervene. *Geders* v. *United States,* 425 U.S. 80 (1976); *Brooks* v. *Tennessee,* 406 U.S. 605 (1972); *Ferguson* v. *Georgia,* 365 U.S. 570 (1961).

Preparation in petitioners' case required a full review and analysis of the government's voluminous exhibits, many not made available to the defense until trial itself. Petition, pp. 7, 10; Circuit Judge (Winter's dissent), Petition, 30a.

The reluctance of the government to make available to the defense copies of its intended trial exhibits a reasonable time before trial should not prejudice defendants. Here, as soon as defense counsel realized he needed the help of an accountant in preparation of the case, he moved for a continuance, only eight days after arraignment and fourteen days before the scheduled trial date. Compare the government's advantage: it took four years to investigate the case and assigned three attorneys to prosecute it. Surely the defense should have been allowed sufficient time to seek expert analysis of the government's mass of documents. Could any defense lawyer try such a case without the help of an experienced accountant?

Of course "the pretrial gathering of such information is

a vital part of the effective assistance of counsel." A. Amsterdam, *Trial Manual for the Defense of Criminal Cases* 1-284 (1977). *Accord, Coleman* v. *Alabama,* 399 U.S. 1, 9 (1970). The commentary to the ABA Standards, § 4.1, p. 227-8, says:

> The relationship of effective investigation by the lawyer to competent representation is patent, for *without adequate investigation* he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial. . . [*W*]*ithout careful preparation he cannot fulfill his role.*

It is difficult for counsel in any case to assess his own effectiveness. The fact that petitioners' counsel appealed on the ground that he had inadequate time to prepare reveals his own view that his performance, given enough time, would have been better. As Judge Winter said in his dissent below:

> "Defense objections were few. Although there was some cross-examination of the government's witnesses, no witnesses were called for the defense. In the cross-examination of the witnesses, there were *no* questions relating to the substance of the government's bank deposits/cash expenditures analysis. Throughout the [defense] counsel repeatedly informed the court that he lacked copies of the exhibits from which a government witness was testifying. Apparently, counsel's complaints were well founded; the district court scolded the government for its disorganized presentation and stated that 'this is one of the sloppiest cases I have even seen.' " Petition, p. 30a.

The lack of any meaningful defense is bad. Worse yet is the cursory nature of the cross-examination of prosecution witnesses.

"Uninformed cross-examination is worse than no cross-examination at all." A. Amsterdam, *supra* p. at 1-285. This principle is implicit in the Court's opinion in *United States* v. *Wade,* 388 U.S. 218, 227, 229-32, 235 (1967).

Defense counsel's performance in this case may not have been so grossly defective that it violated defendants' Sixth Amendment rights to assistance of counsel. However, the Court can focus on the quality of petitioners' legal assistance in determining whether the trial judge abused his discretion in denying them a continuance. Reviewing courts should be more alert to reversal where the defense is rendered less than reasonably effective by inadequate time to prepare a defense. *Gandy* v. *State of Alabama,* 569 F.2d 1318 (5th Cir. 1978).

B. The Effective Assistance Of Counsel Mitigates Against The Unequal Balance Of Resources In The Criminal Justice System.

The formidable ability of a government to amass its investigative and prosecutorial resources against an individual has occasioned the recognition that the due process clause of the Fifth Amendment "does speak to the *balance of forces* between the accused and the accuser." *Wardius* v. *Oregon,* 412 U.S. 470, 474 (1973). A commendable goal of jurisprudence has been to keep "the balance true" in a criminal prosecution. *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934) (Cardozo, J.).

This inherent imbalance of resources must be taken into consideration in assessing a defense request for more preparation time, based upon a demonstrated need[2] to review a mass of financial documents in possession of a government reluctant to make them available. In a tax fraud case,

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[2] See letter of accounting firm to trial counsel, Petition pp. 64a-66a.

and in *any* complex litigation, documentary evidence is usually the crux of the case. If defense counsel, despite the exercise of due diligence, is unable to analyze sufficiently the government's relevant computations, analysis and conclusions because of a shortage of time, the court should grant the defense a reasonable extension.

The abuse of discretion by the District Court is further shown by the lack of any demonstration of prejudice to the government as grounds for denying the continuance. Moreover, the later trial date proposed by the defense was *still* within seventy days of arraignment, the outer reach of a timely trial under the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). Recent amendments to the Act now prohibit trial within thirty days of arraignment without the defendant's consent, 18 U.S.C. § 3161(c)(2) (1979), thus evidencing Congress' determination that less than 30 days is often inadequate to prepare an effective defense.

C. A Trial Court Cannot Apply Standardless Discretion In Disposition Of Requests For Continuance.

Ungar v. *Sarafite,* 376 U.S. 575, 589 (1976), states a self-evident general principle relevant to requests for a continuance, but fails to provide any standards by which discretion may be meaningfully exercised. The result is a hodge-podge of standards as numerous as the circuit courts announcing the rules. Petition, pp. 20-22.

This Court has condemned the standardless exercise of discretion by officials in varying contexts. *E.g., Kunz* v. *New York,* 340 U.S. 290, 294 (1951); *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940). The same principles compel the conclusion that a trial court must similarly rely on discernible standards in exercising a discretion which impacts upon an accused's constitutional rights.

Judicial discretion, while often wide, is not absolute. As Chief Justice Marshall said long ago:

> "Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a *mere legal discretion,* a discretion to be exercised in *discerning the course prescribed by law;* and, when that is discerned, it is the duty of the court to follow it."
>
> *Osborn* v. *Bank of the United States,* 22 U.S. 738, 866 (1824).

Thus, the idea of "discretion" is not a license to run a court as a judge wishes; it cannot shield action inconsistent with the Constitution or the policies enunciated by Congress.

The need to avoid unbounded discretion is greater when *constitutional* rights are at stake. For this reason, courts of appeals have reversed convictions where trial courts' abuses of discretion infringed defendants' constitutional rights. *House* v. *Mayo,* 324 U.S. 42, 45-46 (1945); *Gavino* v. *MacMahon,* 491 F.2d 1191 (2d Cir. 1974); *United States* v. *Ploeger,* 428 F.2d 1204 (6th Cir. 1970) (defendant forced to trial ten days after indictment).

Gavino is most analogous to petitioners' case. The trial judge refused a continuance request in a multi-defendant drug case involving voluminous documentary evidence and less than a month to prepare for trial. The Second Circuit entertained the appellant-defendant's application for a writ of mandamus noting the "readily apparent *absence of any justification* for the district court's action." 499 F.2d at 1195.

> "Without minimizing the importance of the public interest in prompt disposition of criminal cases, we cannot allow our concern with calendar dispatch to triumph over a defendant's right to a fair trial, which is the foundation of our system of justice. To sacrifice a

> fair trial to the interest of expedition would surely undermine the true administration of justice."

Id. at 1196.

The record below is devoid of any indication that the District Judge Bryan exercised discretion in Chief Justice Marshall's sense of the term (p. 9 *supra*). The judge denied defendants' motion by order, without comment, on the same day the motion was filed. He denied another motion for a continuance on the date of trial, the record suggesting that he did so *without even reviewing the motion.* Petition, pp. 7, 9, 29a. If the District Court was guided by *any* standards in the exercise of its discretion, the record does not reveal what they were.

D. Standards Should Be Set By This Court For Complex Cases To Guide The Discretion Of The Trial Judge Where:

(a) The request is not made for delay, and

(b) No unreasonable delay is necessitated, and

(c) Where defense counsel has been reasonably diligent in attempting, unsuccessfully, to procure evidence vital for the defense, and

(d) Where a continuance is necessary to allow the defense to seek the aid of experts or other witnesses who are reasonably necessary to effectuate an adequate defense, and

(e) Where Counsel's actual performance, even if not so grossly defective as to violate the Sixth Amendment's right to counsel, still is less than reasonably effective?

(f) The case is complex, and its nature calls for complex expert advice, the character of which cannot be predicted fully in advance.

Several Courts of Appeals have attempted to enunciate standards of reversing trial courts' refusal to grant continuances. *Delaney* v. *United States,* 199 F.2d 107 (1st

Cir. 1952); *Everitt* v. *United States,* 281 F.2d 429 (5th Cir. 1960); *J. E. Hanger, Inc.* v. *United States,* 160 F.2d 8, 81 U.S. App. D.C. 408 (1947); *Gavino* v. *MacMahon,* 499 F.2d 1191 (2d Cir. 1974); *Gandy* v. *State of Alabama,* 569 F.2d 1318 (5th Cir. 1978). While action on an application for a continuance is generally within the *sound* discretion of the trial court, such discretion is not unlimited, and must be ". . . in accordance with fixed legal principles and with a view to promoting substantial justice, and in such a manner as to prevent injustice and oppression". 17 C.J.S. *"Continuances"* p. 379. Unfortunately ". . . appellate courts have sometimes overstrained the point in the latitude they have accorded to the determination of the trial judge on matters of this sort" *Delaney, supra,* 199 F.2d at 115.

None of the cases cited here, or in the Petition for Certiorari, gives much in the way of standards for the trial courts to follow. Perhaps the most complete are found in *Gandy, supra,* 569 F.2d at 1324, where it was said:

> "While what is a 'fair or reasonable opportunity' [for preparation] depends upon all the surrounding circumstances, some factors to be considered include: (1) the *length* of the requested delay; (2) whether the lead counsel has an *associate* who is adequately prepared to try the case; (3) whether *other* continuances have been requested or granted; (4) the *balanced* convenience or inconvenience to litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a *legitimate reason,* or whether it is dilatory and contrived; (6) whether there are other unique factors present."

The factors listed in *Gandy* are helpful, but not all courts follow the Fifth Circuit's lead on this. Furthermore, these standards are not sufficiently specific to focus on the kind of problem found at bar where the short continuance re-

quested was necessary to obtain expert advice central to the trial in question.

Amici suggest a more precise rule that accounts for the need for experts, particularly in complex documentary cases where the need in general is demonstrable even though the specific need in a specific case may be difficult to delineate.

We have already discussed counsel's performance as one criterion for reversal of a denial of a continuance where the lack of time causes an inept performance where the lack of time causes an inept performance that yet survives a Sixth Amendment "incompetence" attack. Other factors likewise suggest criteria.

The request must not be made only for the purpose of delaying the proceedings. Here, counsel made his request promptly after learning the facts and discovering the need for expert analysis which could not be completed within the time constraints of the trial date. Some may argue that counsel should have realized the complex generic nature of this type of case, and should have pleaded for more time *at arraignment*. Such a half-informed plea would have been *irresponsible*. Employed over the preceding weekend, counsel knew little of the specific facts of the case. To have pleaded for more time based solely on the generic complexity of tax fraud cases would have flouted counsel's duty to accommodate and to be candid with the court and would have been poor tactics. Furthermore, the court should be expected to be *more* sensitive to the generic complexity of certain kinds of cases than *counsel*—most lawyers try *few* complex cases, judges try *many*.

No unreasonable delay was asked here; only a *short* one. The trial date could have been reset well within the seventy days mandated by the speedy trial act.

The record discloses that defense counsel was reasonably diligent in attempting to procure defense evidence and to prepare the case.

One feature peculiar to complex tax fraud, securities, antitrust and other complex white collar crime cases is the large amount of documentary evidence necessary to prosecute or defend. In a simpler case the anticipated testimony usually can be set out by affidavit in a motion for continuance, and the trial judge has a basis for granting or denying the continuance. But in the complex document case, the expert's findings and opinions cannot be predicted until the analysis is done. Defendant is put in a quandary. He claims the need for witnesses and expert advice, but cannot state how they will ultimately help his case. Yet such help generally is a necessity for any successful defense in such a case.

E. The Threat To Justice In A Routine Practice Of Denying Continuances Without Applying Any Standard Other Than Expeditiousness Is Sufficient To Require This Court's Exercise Of Its Supervisory Powers.

This Court bears ultimate responsibility for overseeing the administration of justice in the federal courts. Should it determine that the *Constitution itself* does not require the application of guiding standards to a trial court's determination of a continuance request, *amici* respectfully urge the Court to exercise its *supervisory* powers and formulate workable standards to guide trial court discretion.

> The scope of our reviewing power over convictions brought here from the federal courts is *not* confined to ascertainment of *Constitutional* validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of *establishing and*

> *maintaining civilized standards of procedure* and evidence.

McNabb v. *United States*, 318 U.S. 332, 340 (1942).

Judge Winter's strong dissent below, the record in this case and the general policy of the Eastern District of Virginia to *routinely* deny reasonable continuance requests, amply illustrate the need for this Court to intervene in the interest of the administration of justice.

Petitioners' case does not represent an isolated incident but rather the unfortunate and unnecessary result of a "myopic" insistence of expeditiousness characteristic of the Eastern District of Virginia where some of the district judges grant a continuance only in the rarest of circumstances.[4]

In *Fletcher* v. *United States*, No. 79-5068 (4th Cir. appeal pending), for example, local counsel, who had not participated in any pretrial defense preparation or consultation, was forced to trial in a multi-defendant, complicated drug case *five days* after being informed by retained counsel that retained counsel would be unable to try the case. The same district judge whose ruling is being challenged here *refused* local counsel's request for a continuance and/or a severance.

Expeditiousness in criminal proceedings is best effectuated through liberal discovery procedures and cooperation rather than competition between opposing counsel. Expeditiousness is only frustrated by a policy which encourages the government to take full advantage of surprise at

[4] Of all judicial districts with 25 or more criminal cases on the annual docket, the Eastern District of Virginia ranked *second* in speed in resolving jury and bench trials. The median time for resolving jury trials nationally is 5.2 months. The Eastern District of Virginia averages *2.4 months*—half as long! Annual Report of the Director of the Administrative Office of the United States Courts. 418 (1978). See Appendix A, p. App. 1, *infra*.

trial with the concommitant delay resulting when the trial must recess in order to allow the defense sufficient time to review documents which should have been disclosed prior to trial. See, *United States* v. *Algie,* 28 Cr.L. Rep. 2149 (E.D. Ky. Oct. 1, 1980).

The rationale underlying the argument in support of liberal discovery is:

> based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial.

Wardius v. *Oregon,* 412 U.S. 470, 473 (1973).

In a similar vein, the ABA Standards call for maximum cooperation and disclosure in criminal discovery. Sections 1.1(a) (i) and (iii), 1.2(a) and (b) and accompanying Commentary (Approved Draft 1970); *ABA Standards Relating to the Prosecution Function and the Defense Function,* § 3.11(b), 4.1 and accompanying Commentary (Approved Draft 1971). These standards which represent over a decade of intensive study and work by more than a hundred of the nation's leading jurists, scholars and lawyers "offer the best prospect of meaningful improvement of our criminal justice system in this generation and their legal community." Burger, *Introduction: The ABA Standards for Criminal Justice,* 12 Am. Crim. L. Rev. 251 (1974).

Despite the admonition that "the prosecutor should seek in good faith to make [discovery procedures] function fairly and effectively," *ABA Standards Relating to the Prosecution Function* Section 3.11(b) (Approved Draft 1971), the prosecutors in this case *withheld the most vital of the government exhibits* from the defense, not revealing the

exhibits until trial itself. Such conduct makes a mockery of the accused's right to the effective assistance of counsel and dignifies the sporting theory of criminal justice. *See* Brennan, *The Criminal Prosecution, Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279.

The fundamental importance of the effective assistance of counsel to our scheme of justice requires that the Court formulate workable guidelines to aid courts and defendants in determining the need for a continuance in any given circumstances. Continuances may still be delegated to the trial courts' discretion, but it must be a *sound* discretion, rooted in *standards* that safeguard the accused's fundamental right to a fair trial.

The approach of the Court of Appeals in looking for *prejudice* to the accused misses the mark, for where the defense is denied adequate opportunity to prepare, not only the defendant but the public at large loses. Due process demands not only that justice be done, but that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Where there is any doubt, the Court must resolve the doubt in favor of the accused since there is no way to tell "what a prompt and thoroughgoing investigation might disclose as to the facts." *Powell* v. *Alabama*, 287 U.S. 45, 58 (1932). *See Effective Assistance of Counsel*, 8 Seton Hall L. Rev. 562 (1977) (defendant need not bear burden of proof on issue of prejudice).

This court has criticized the requirement that an accused demonstrate prejudice where the action complained of denies the accused the effective assistance of counsel:

> The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser v. *United States,* 315 U.S. 60, 76 (1942); *Argersinger* v. *Hamlin,* 407 U.S. 25 (1972).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant a writ of certiorari and set this case down for briefing and argument, or, in the alternative, that certiorari be granted and the conviction below summarily reversed. Rule 23.1.

Respectfully submitted,

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APPENDIX A

Statistics Regarding Disposition Of Criminal Cases Comparing The Eastern District Of Virginia To National Averages.

According to the 1978 *Annual Report of the Director of the Administrative Office of the United States Courts,* the Eastern District of Virginia ranks second to all districts, in speed from filing to disposition of court trial cases, taking an average of .8 months to dispose of all criminal cases. The Middle District of Georgia was first with an average time of .6 months, handling, however, only 53 cases to 118 handled by the Eastern District of Virginia.

The average time for all 95 districts from filing to disposition of court cases is 3.2 months. The Eastern District of Virginia disposes of their court cases on an average of 2.4 months faster than most other districts.

Looking at the disposition of jury trials for 1978, the Eastern District of Virginia again ranks second in speed with only the Eastern District of Oklahoma moving jury trials faster. Where the average amount of time for all districts is 5.2 months, the Eastern District of Virginia averages 2.4 months.

If ranked according to Circuits, the 4th Circuit moves both court and jury trials faster than any other Circuit. It should be noted as well that the median time from filing to disposition for all other Circuits was substantially longer.